Supreme Court, U.S.
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No. 71-818

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

PACE CO., DIVISION OF AMBAC INDUSTRIES, INCORPORATED, *Plaintiff-Petitioner,*

v.

ROBERT F. FROEHLKE, Secretary of the Army, ET AL., *Defendants-Respondents.*

PACE CO., DIVISION OF AMBAC INDUSTRIES, INCORPORATED, *Plaintiff-Petitioner,*

v.

MAXSON ELECTRONICS CORPORATION, *Intervenor Defendant-Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT MAXSON ELECTRONICS CORPORATION IN OPPOSITION TO PETITION

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OPINIONS BELOW

The opinions delivered in the courts below are not as yet officially reported but have been appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition for a Writ of Certiorari.

QUESTION PRESENTED

The sole question presented is whether the United States Court of Appeals for the Sixth Circuit correctly determined that the District Court had abused its discretion by enjoining the Secretary of the Army from proceeding with a necessary procurement of munitions notwithstanding the representation by the Secretary of the Army that the national welfare would be materially affected by the injunction.

STATUTES AND REGULATIONS

The relevant portions of the Armed Services Procurement Regulations (ASPR), 32 C.F.R. Parts 1-8, the Administrative Procedure Act, 5 U.S.C. §§ 702 and 706 (1971), and the Armed Services Procurement Act, 10 U.S.C. §§ 2304(a)(2) and 2305 (1971); are set forth in the Petition (Petition 4-7).

STATEMENT OF THE CASE

This case arises out of competitive bidding for a Government procurement of 81 MM shells for use in Vietnam. The Secretary of the Army, acting through the Munitions Division of the United States Army at Joliet, Illinois, issued an Invitation for Bids on June 21, 1971 for the production and delivery of a quantity of 81 MM illuminating cartridges. Nine companies submitted bids pursuant to the Invitation. The price was to be determined by adding the bid price for the shells to the bidder's guaranteed cost of transportation of the shells to Vietnam. The transportation costs

were calculated by the Army based upon certain data furnished by the bidder. Each bidder furnished estimated measurements and weights for the shipping cartons which varied, with no two bidders submitting identical data. The data were submitted on a form entitled "Guaranteed Maximum Shipping Data For F.O.B. Origin Deliveries." The form provided that if the bidder submitted no data that bid would be evaluated by adding the highest transportation costs calculated from those bidders who did submit data. The purpose of these data was to permit the Army to calculate as a bid factor the bidder's guaranteed shipping costs. If the cost to the Army of shipping the shells from the place of manufacture to Vietnam exceeded the transportation costs guaranteed by the bidder, the contract price was to be reduced by the excess of such costs.

Maxson Electronics Corporation (Intervenor-Defendant below and Respondent here) was determined by the Contracting Officer to be the low bidder for this procurement. Petitioner first filed a protest with the Comptroller General challenging the Maxson bid, but before the Comptroller General had acted, filed a complaint in the District Court and received a temporary restraining order without notice restraining the award of the contract to Maxson. The District Court thereafter entered a preliminary injunction. The Secretary of the Army moved to dissolve the injunction supporting the motion with an affidavit representing that the shells were urgently needed and that continuation of the injunction would impair the public interest by interfering with the continued flow of munitions for use in Vietnam. The District Court denied the motion to dissolve the injunction.

The Respondents filed an Application for a Stay with the Sixth Circuit Court of Appeals along with a Motion for Summary Reversal. After oral argument on December 6, 1971, the Court of Appeals held *per curiam* on December 9, 1971 that the District Court's failure to vacate the injunction upon the representation of the Secretary of the Army that the national welfare would be materially affected by the injunction was an abuse of discretion. The Court specifically declined to consider any other issues presented in the appeal. The case was remanded with instructions to vacate the injunction.

ARGUMENT

The question presented by this Petition does not raise the issue of jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 706 (1971), since the District Court entertained jurisdiction and the issue was not reached by the Court of Appeals. The case thus remains in the District Court for further proceedings on the merits. The sole question here is the propriety of the District Court's refusal to dissolve a preliminary injunction enjoining the Secretary of the Army from proceeding with the procurement of urgently needed munitions for use in Vietnam pending hearing on the merits of the complaint. The Court of Appeals held that the refusal to dissolve the injunction was an abuse of discretion.

This Court held, almost 28 years ago, in *Yakus* v. *United States*, 321 U.S. 414 (1944):

> But where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest

> withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff. [p. 440]

Petitioner is not entitled to a preliminary injunction as a matter of right even though irreparable injury is alleged. *Ibid.* This rule is particularly applicable here where Petitioner, if it is successful, may recover damages in the United States Court of Claims even though the District Court would not have jurisdiction to award damages in excess of $10,000. Although Petitioner did not seek damages in its complaint, the Court of Claims has clearly held that damages will be awarded to a bidder who was improperly denied an award of a Government contract.*

The United States Court of Appeals for the District of Columbia, the appellate court which has by far the most experience with actions brought by a disappointed bidder for a Government contract, recently held:

> It would be intolerable for any frustrated bidder to render uncertain for a prolonged period of time Government contracts which are vital to the functions performed by the sovereign. The frivolous lawsuit can, of course, be terminated swiftly by the summary judgment procedure in the Federal Rules of Civil Procedure. However, even assuming a colorable claim by the disappointed bidder, it does not follow that he is entitled to an evidentiary hearing and judicial determination of the merits of his claim before termination of the procurement process. [*Steinthal & Co. v. Seamans*, — F.2d —, No. 24,595 (D.C. Cir. Oct. 14, 1971) p. 26].

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* *Continental Business Enterprises, Inc. v. United States*, — Ct. Cl. —, — F.2d — (Dec. 10, 1971); *Keco Industries, Inc. v. United States*, 192 Ct. Cl. 773, 428 F.2d 1233 (1970); *Heyer Products Co. v. United States*, 135 Ct. Cl. 63, 140 F. Supp. 409 (1956).

The court then concluded:

> However the public interest in a Government procurement process that proceeds with expedition is likewise of importance. The court must refrain from judicial intervention into the procurement process unless the actions of the executive officials are without any rational basis. [*Id.* at 31-32]

Where a temporary injunction has an adverse impact on the public interest and interferes with the right of a sovereign to procure urgently needed munitions, there is an abuse of discretion in the refusal to dissolve the injunction. Clearly this proposition is sound when Petitioner has a remedy at law—an action for money damages in the United States Court of Claims.

Petitioner suggests to the Court that there may be a conflict among the Circuits as a result of the decision of the Sixth Circuit Court of Appeals below. In fact the Circuits are surprisingly uniform in their reluctance to allow an injunction to stand where it interferes with the Government procurement processes. In *Steinthal & Co.* v. *Seamans, supra;* and *Wheelabrator Corp.* v. *Chaffee*, — F.2d —, Nos. 24,705, 24,729 (D.C. Cir. Oct. 14, 1971), where the District Courts had entered injunctions at the request of disappointed bidders, the Court of Appeals for the District of Columbia summarily reversed both decisions and directed that the injunctions be dissolved. Similarly, the Fifth Circuit Court of Appeals in *Hayes International Corp.* v. *Seamans*, — F.2d —, No. 71-1369 (5th Cir. Oct. 15, 1971), where the District Court had entered an injunction to stay the procurement process pending a hearing on the merits, entered a stay of the injunction without oral argument permitting the Government procurement to proceed without delay. There is thus no sub-

stantial question presented by the Petition upon which this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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